Supreme Court, U.S.
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No. 98-1960

IN THE

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner demonstrated in its opening brief that the special venue provisions of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, are permissive in nature and do not preclude application of the general venue statute to requests to confirm, vacate, or modify arbitration awards. This conclusion is dictated by the permissive language of these provisions and confirmed by the contrasting use of mandatory language elsewhere in the FAA, by the overall structure and purpose of the Act, and by Congress' historical treatment of venue. *See* Pet. Br. at 11-19. This conclusion is also supported by the presumption, applied by this Court in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), that special venue provisions supplement the general venue statute. *See* Pet. Br. at 19-34. Based upon these considerations, the vast majority of courts and commentators have likewise concluded that the FAA's venue provisions are permissive. *See id.* at 32-35.

Respondent Bill Harbert Construction Company does not cast serious doubt upon the conclusion that the FAA's special venue provisions are permissive. Indeed, respondent's brief either concedes or does not dispute most of the points made in the opening brief. Moreover, none of the arguments advanced by respondent reconciles its restrictive interpretation with the plain language of the FAA or with the presumption applied by this Court in *Suarez*.

1. Although this Court has admonished parties that, in interpreting a statute, one must "look first to its language, giving the words used their ordinary meaning," *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quotations and citations omitted), respondent does not seriously challenge petitioner's analysis of the language of the FAA's special venue provisions.

As petitioner demonstrated, the FAA's special venue provisions state where a party "may" apply to confirm an arbitration award (9 U.S.C. § 9) and where an order vacating or modifying an award "may" be made (*id.* §§ 10-11). The ordinary,

everyday meaning of this language is indisputably permissive. *See* Pet. Br. at 12. Moreover, it is clear from the context that Congress was using this language in its ordinary, permissive sense because elsewhere in Section 9 itself and in the rest of the FAA Congress uses mandatory language such as "shall" or "must" to indicate mandatory requirements. *See id.* at 13 & n.3 (discussing 9 U.S.C. §§ 2-4, 6, 9, 12-13); *see also United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895) (noting that, when used "'in special contradistinction'" to mandatory language, the word "may" must be given its ordinary, permissive meaning). A permissive interpretation is also consistent with Congress' practice of using unambiguously restrictive language in special venue statutes that it intends to be exclusive (*see* Pet. Br. at 13-14 & nn. 4-6); with the structure of the FAA, which would be subject to a venue gap and to irrational distinctions under a restrictive interpretation (*see id.* at 15-17); and with the common sense assumption that Congress intended to permit actions to vacate or confirm arbitration awards to be brought in convenient venues such as the district where the defendant resides (*see id.* at 17-19).

Most of these points are unchallenged. Indeed, the only aspect of petitioner's textual analysis that respondent contests is the demonstration that a restrictive interpretation of the FAA's special venue provisions would create a venue gap by prohibiting the application of the original portions of the FAA to arbitrations conducted abroad. *See* Pet. Br. at 16; *see also id.* at 15 & n.5 (noting later amendments implementing international arbitration conventions). Respondent does not, however, explain how the FAA's special venue provisions apply to such arbitrations under its interpretation. Instead, it argues that the FAA as originally enacted did not apply to foreign arbitrations at all. *See* Resp. Br. at 30. This position is untenable. As petitioner pointed out, the original provisions of the Act expressly encompass contracts involving "commerce . . . with foreign nations." 9 U.S.C. § 1 (defining "commerce"); *see also id.* § 2 (providing for enforcement of arbitration

agreements in transactions involving "commerce"). Moreover, this Court has applied the original provisions of the Act to an agreement to conduct an arbitration in Paris. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508, 519-20 (1974). Thus, respondent's restrictive interpretation clearly does create a venue gap.

2. In supposed support of its restrictive interpretation, respondent points to language in Section 4 of the FAA that is not contained in the Act's special venue provisions. According to respondent, Section 4 contains "the very language [petitioner] suggests should be implicit in all the venue provisions of the FAA," and because that language is not included in Sections 9, 10, and 11, those sections should be read to preclude application of the general venue statute. Resp. Br. at 11-12. In fact, however, the passage in question does not even deal with venue.

The passage cited by respondent authorizes a party seeking to compel performance of an arbitration agreement to "petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Respondent's contention that this passage somehow relates to venue is mystifying. In referring to "*jurisdiction . . . of the subject matter* of a suit," the passage plainly deals with subject matter jurisdiction, not venue. *See, e.g., Lindahl v. OPM*, 470 U.S. 768, 793 & n.30 (1985) (noting that subject matter jurisdiction is the "power to adjudicate" while venue is the "place where judicial authority may be exercised"). It makes no difference that Title 28 contains the general venue provisions, *see* Resp. Br. at 12, because that Title also contains the subject matter jurisdiction statutes. *See* 28 U.S.C. §§ 1330-68.

Equally meritless is respondent's assertion that, if Congress had not intended to restrict venue to a single court, "it would have specified no court at all, or would have authorized 'any

court of competent jurisdiction.'" Resp. Br. at 12 (quotation omitted). As petitioner explained, Congress had good reason to choose a third option: supplementing the general venue statute. *See* Pet. Br. at 17-18. When the FAA was enacted in 1925, courts frequently refused to enforce forum selection clauses, *see, e.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 19 (1972), and the general venue statute did not authorize suits outside the district of the defendant's residence. *See* 28 U.S.C. § 112(a) (1926 ed.) (providing only for residential venue). As a consequence, in order to ensure that applications to confirm, vacate, or modify arbitration awards could be brought in districts specified by the parties and in the districts in which those awards were made as well as in the district in which the defendant resided, Congress needed to supplement the general venue statute. Thus, a permissive interpretation resulting in limited supplementation of the general venue statute makes perfect sense.

By contrast, the restrictive interpretation advanced by respondent makes little sense because it would prevent applications to confirm, vacate, or modify arbitration awards from being brought in the district where the defendant resides — the one venue that is almost always convenient for the defendant. *See* Pet. Br. at 18-19. Notably absent from respondent's brief is any explanation for why Congress would have wanted to prohibit applications to confirm, vacate, or modify arbitration awards where the defendant resides.

3. Respondent also argues that the special venue provisions in Sections 10 and 11 are exclusive of the general venue statute because the language of those sections differs from that of Section 9. *See* Resp. Br. at 13-16. This argument is meritless as well.

a. Under Section 9, parties who "have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration" and who "specify the court" to enter that award may apply to the court so specified for

confirmation of an arbitration award. 9 U.S.C. § 9. As Sections 10 and 11 do not contain an analogous provision, respondent speculates that Congress viewed confirmation of arbitration awards as "virtually a ministerial act" and applications to vacate or modify arbitration awards as analogous to appeals. Resp. Br. at 14. Respondent does not, however, offer any evidence or authority in support of this speculation. Moreover, it fails to reconcile this argument with its contention that all three venue provisions are restrictive.

b. Respondent also argues that, as used in Sections 10 and 11, the word "may" does not identify the court that may vacate or modify an award but instead relates to "the power or authority of the court to vacate [or modify] an award." Resp. Br. at 15 (quotation omitted). Respondent is, however, unable to point to any restrictive language in these sections supporting its restrictive interpretation. More fundamentally, under a restrictive interpretation, an application to confirm the award cannot be brought in the same court as an application to vacate or modify that same award in certain cases, *see* Pet. Br. at 31-32, an absurd result that has been rejected by "[e]very federal circuit court to address the issue, whether or not it holds that the FAA authorizes more than one federal court to confirm or vacate arbitration awards." *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 868 (10th Cir. 1999). Accordingly, Sections 10 and 11 should be interpreted to be in harmony with the plainly permissive venue requirements of its statutory neighbor Section 9 — which is exactly what is required by respondent's recognition of the principle that "statutory construction is a holistic endeavor." Resp. Br. at 9 (quotation omitted).

4. As the opening brief showed, even if the language of the FAA's special venue provisions, the structure of the Act, and common sense did not dictate a permissive interpretation of the FAA's special venue provisions, a permissive interpretation would still be compelled by the presumption applied by this Court in *Suarez* that special venue provisions supplement the

general venue statute. *See* Pet. Br. at 19 & n.11, 24-26. In response, respondent does not — and cannot — assert that this presumption has been rebutted here. Instead, it argues that there is no such presumption and that, in fact, the opposite presumption controls. These arguments are baseless.

Respondent dismisses this Court's decision in *Suarez* by noting that the precise issue before the Court in that case was whether the special venue provision in the Jones Act, 46 U.S.C. § 688 *et seq.*, incorporates the definition of corporate residence in the general venue statute. *See* Resp. Br. at 32-34. Petitioner did not, however, argue that the holding in *Suarez* was directly on point. Instead, petitioner demonstrated that *Suarez* presumed that the special venue provision in the Jones Act was supplemented by the general venue statute and that this same reasoning is applicable in this case. *See* Pet. Br. at 24-26. Nothing in respondent's brief casts doubt upon this simple but crucial point.

Respondent also fails to cast any doubt upon the validity of the presumption that special venue statutes supplement the general venue statute. As the opening brief explained, this presumption is supported by three factors: (1) Congress' historical practice of enacting special venue provisions "'to widen plaintiffs' venue choices,'" *id.* at 20 (quoting *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.)); (2) the principle that statutes should be interpreted to "'regard each other as effective,'" *id.* at 23 (quoting *Vimar Seguros Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)); and (3) the unacceptable patchwork of arcane and antiquated exceptions that would result if the hundreds of special venue statutes enacted by Congress were interpreted restrictively, *see id.* at 23-24. Respondent does not dispute any of these points. Moreover, while it accuses the Tenth Circuit of mischaracterizing the holding in *Suarez*, *see* Resp. Br. at 32, it does not deny that courts and commentators alike have recognized the presumption that special venue

statutes supplement the general venue statute. *See* Pet. Br. at 19 & n.11 (listing authorities).

In opposition to the presumption that special venue statutes supplement the general venue statute, respondent invokes a canon of statutory construction: the principle that a specific statute normally controls a more general one. *See* Resp. Br. at 31. This canon does not, however, conflict with the presumption that special venue statutes supplement the general venue statute for the simple reason that the presumption is used in construing the special, not the general, venue statute. Indeed, in *Suarez*, this Court recognized that the Jones Act's venue provision, as the more specific statute, governs application of the general venue statute. *See Suarez*, 384 U.S. at 203 (noting that the "Jones Act . . . ultimately governs the venue issue before us"). Thus, respondent's invocation of the canon that the specific governs the general begs the question before this Court, which is whether the FAA's special venue provisions were intended to be exclusive.

This Court's decision in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), does not overrule *Suarez* or otherwise cast doubt upon the presumption that special venue statutes supplement the general venue statute. In *Radzanower*, a national banking association based in Boston was sued in the Southern District of New York for alleged securities violations based upon the relatively broad special venue provision in the 1934 Act. *See* 426 U.S. at 150 (discussing 15 U.S.C. § 78aa). When the bank moved to dismiss under the narrower venue provisions then-applicable to national banks, *see* 12 U.S.C. § 94 (1976 ed.), this Court held that the latter provision, which was "mandatory and exclusive," was more specific and therefore controlled. 426 U.S. at 150, 152-58. *Radzanower* did not consider the application of the general venue statute or this Court's prior opinion in *Suarez*, and respondent fails to explain how this Court's reasoning in *Radzanower* has any bearing on the interpretation of the FAA's special venue provisions.

Respondent also argues that the FAA's special venue provisions are presumably exclusive because the FAA "establishe[d] a new cause of action or remedy not found in common law." Resp. Br. at 24. Once again, respondent's argument is based upon a mistaken premise: the FAA did not establish a cause of action unknown at common law. As petitioner has already pointed out, while common law courts were reluctant to specifically enforce agreements to arbitrate, "arbitration awards, unlike agreements to arbitrate, were specifically enforced at common law." Pet. Br. at 3. Indeed, this Court specifically enforced an arbitration award over seventy years before the passage of the FAA. *See Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854); *see generally* IV Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 38.2.2, at 38:22 (1999) (noting that, at the time the FAA was enacted, "in both state and federal courts, arbitration awards were fully enforceable in court").

There is no basis for respondent's claim that "[w]here venue is defined by the same statute that creates the right, such venue generally is intended to be exclusive." Resp. Br. at 23. Although the D.C. Circuit has stated that venue under Title VII is "limited by the statute which created the right," *Stebbins v. State Farm Mut. Auto. Ins. Co.*, 413 F.2d 1100, 1102 (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 895 (1969), that statement represented the Court's conclusion, not its rationale, and the other case on which respondent relies for its claim simply paraphrases this conclusion. *See Bolar v. Frank*, 938 F.2d 377, 378 (2d Cir. 1991). Moreover, contrary to respondent's assertion, *see* Resp. Br. at 24, the *exclusio unius est exclusio alterius* canon of construction cannot support the weight of respondent's newly-minted rule because, as this Court has long held, that canon applies only where the meaning of a statute is otherwise unclear. *See, e.g.*, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) (noting that the canon is "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating purpose,

will read text in light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy").

Finally, if, as respondent suggests, the FAA were interpreted to create a narrow, expedited statutory cause of action whose procedures "must be followed and none other," Resp. Br. at 24 (quotation omitted), respondent would not be able to rely upon the Act's venue provisions because it failed to follow the procedures established by the statute. Under the FAA, "[a] party initiates judicial review of an arbitration award not by filing a complaint in the district court, but rather by filing either a petition to confirm the award or a motion to vacate or modify the award." *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990).[1] Respondent, however, commenced this case with the filing of a complaint and the issuance of a summons rather than an application to confirm and a notice of motion, and petitioner did the same in Mississippi. J.A. 1, 4-6, 21-26. Thus, if the FAA's provisions are to be strictly enforced, the proceedings before this Court must be treated as common law rather than statutory proceedings, *see generally* I Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 9.10 (1999) (discussing the survival of common law actions), and the FAA's special venue provisions are inapplicable here.

5. Respondent also seeks support for its restrictive interpretation in the legislative history of the FAA. *See* Resp. Br. at 20-22. As this Court has repeatedly recognized, however, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary

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[1] *See also* 9 U.S.C. § 9 (requiring a "[n]otice of the application" to be served in the manner prescribed for "service of notice of motion"); *id.* § 13 (noting that a party seeking to confirm, modify, or correct an arbitration award "*mov*[*es*] for an order confirming, modifying, or correcting an award" and that an order confirming an arbitration award is enforced "*as if* it had been rendered in an action") (emphasis added).

circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995). Under such circumstances, there must at a minimum be a "clearly expressed legislative intent to the contrary" in order to justify a departure from the clear meaning of a statute. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quotation omitted). Here, respondent concedes (as it must) that the legislative history "offers little specific guidance in determining proper venue under §§ 9, 10, or 11." Resp. Br. at 19. As a consequence, the legislative history cannot overcome the clear meaning established by the language of the FAA's special venue provisions, the structure of the Act, and the historical context. For the same reason, the legislative history cannot provide the clear evidence of congressional intent necessary to overcome the presumption that special venue provisions supplement the general venue statute.

Even if the legislative history were relevant, it would not offer respondent's restrictive interpretation any support. As petitioner demonstrated, the language in Sections 9, 10, and 11 was modeled after provisions in the New York's 1920 arbitration law, which were permissive in nature. *See* Pet. Br. at 28-29 & n.14. Instead, respondent asserts that, because the New York law contained a provision not found in the FAA permitting entry of judgment in any county, Sections 9, 10, and 11 of the FAA should be given a restrictive interpretation. *See* Resp. Br. at 20-22 (discussing N.Y. Civil Practice Act § 1449, *reprinted in Clevenger's New York Practice* 615 (1922)). In other words, according to respondent, language that is permissive in the New York law should be given the *opposite* meaning in Sections 9, 10, and 11 of the FAA because the FAA does not borrow a *different* provision in the New York statute. This assertion turns on its head the principle that "adoption of the wording of a statute from another legislative jurisdiction carries with it" the legislative intent of that jurisdiction. *Shannon v. United States*, 512 U.S. 573, 580-81 (1994).

Nor does the sole authority that respondent cites in support of this assertion suggest otherwise. In *Kirchner v. Chattanooga Choo Choo*, 10 F.3d 737 (10th Cir. 1993), the Tenth Circuit considered whether a right of action for damages could be implied into Oklahoma's residential landlord and tenant act. Because that act was modeled after the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 430 (1985), but did not include a provision in the uniform act expressly authorizing damage claims, the Tenth Circuit concluded that such damages were not available under the Oklahoma law. *See Kirchner*, 10 F.3d at 738-39. Respondent does not even begin to explain how this innocuous ruling supports the bizarre inference respondent would have this Court draw.

Not surprisingly, respondent also ignores the most natural explanation for omission of the provision in question from the FAA. According to that provision, an agreement to submit an existing dispute to arbitration could "provide that a judgment of a specified court shall be rendered upon the award made pursuant to the submission" and, in the absence of such a specification, "the judgment may be entered in any county." N.Y. Civil Practice Act § 1449, *reprinted in Clevenger's New York Practice* 615 (1922) (brackets omitted); *see also* II Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 17.1.2, at 17:5 to 17:6 (1999). It would, however, have been obviously inefficient and unfair to include an analogous provision in the FAA authorizing venue in any district in the nation. As a consequence, Congress had to change the default rule, and it was perfectly logical for Congress to make the general venue statute the default by omitting Section 1449 from the FAA.

6. Citing three special venue provisions, respondent points out that Congress does not always use unambiguous language when it intends venue to be exclusive. *See* Resp. Br. at 16-19. In each of these provisions, however, Congress' intent to restrict venue was clear. As just the opposite is true here, these cases offer respondent little support.

This Court has long held that the special venue provision for patent infringement suits, 28 U.S.C. § 1400(b), is exclusive of the general venue statute based upon the clear and unambiguous legislative history of that provision. *See, e.g.*, *Fourco Glass Co. v. Transmitta Prods. Corp.*, 353 U.S. 222 (1957); *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942). Before this provision was enacted, the lower courts were divided over the scope of venue in patent infringement suits. *See Stonite*, 315 U.S. at 564-65. In response to this "great uncertainty," Congress enacted a bill "intended to remove this uncertainty *and to define the exact jurisdiction of the circuit courts in these matters*." 29 Cong. Rec. 1900-01 (1897) (statement of Rep. Mitchell) (emphasis added). Recognizing the resulting special venue provision to be a "restrictive measure, limiting a prior, broader venue," this Court held that this provision "alone should control venue in patent infringement proceedings." *Stonite*, 315 U.S. at 566-67. This ruling offers respondent's interpretation no support because, as respondent itself concedes, "[t]he legislative history of the FAA offers little specific guidance in determining proper venue under §§ 9, 10, or 11." Resp. Br. at 19.

This Court has also held that the special venue provision formerly governing actions against national banks, *see* Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 320,[2] was exclusive. *See, e.g.*, *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35, 38 (1977); *Radzanower*, 426 U.S. at 152. The purpose of that provision required it to be exclusive: the provision was

[2] In 1982, this provision was replaced by a narrower (and explicitly mandatory) one. *See* Pub. L. No. 97-320, § 406, 96 Stat. 1512 (codified at 12 U.S.C. § 94) (providing that "[a]ny action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver . . *shall* be brought" in the district or county where the association's principal place of business is located) (emphasis added).

enacted to prevent the "untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation." *Citizens & Southern Nat'l Bank*, 434 U.S. at 48; *see also* S. Rep. No. 97-536, at 28 (1982), *reprinted in* 82 U.S.C.C.A.N. 3054, 3082 ("The special venue provision was originally intended to prevent the inconvenience and the interruption of business that might occur if centrally located bank records were sent to distant courts."). Respondent cannot claim that any similar protective intent motivated the FAA's special venue provisions, especially given that its restrictive interpretation would in some cases prohibit applications to confirm, vacate, or modify from being brought in the district in which a defendant resides. *See supra* p. 4. Moreover, respondent's suggestion that these cases turned upon the canon that the specific controls the general has no basis: although *Radzanower* mentioned the canon, it did so *after* noting that the special venue provision in question was mandatory. *See Radzanower*, 426 U.S. at 152-53; *see also supra* p. 7.

This Court has also indicated (in unexplained dictum) that Title VII's venue provision, 42 U.S.C. § 2000e-5(f), is exclusive of the general venue statute. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991). Congress' intent to exclude application of the general venue statute is implicit in the structure of Title VII's special venue provision: as the leading lower court decision on the issue noted, this comprehensive statute designates three separate judicial districts with relations to employment discrimination claims, and, where none of these districts are available, it provides for a form of residential venue that is "significantly more restrictive" than the general venue statute. *See Stebbins*, 413 F.2d at 1102-03.[3] By

[3] Title VII's special venue provision states in pertinent part:

> an action may be brought in any judicial district in the State in which the unlawful unemployment practice is alleged to have been

contrast, the special venue provisions in the FAA are limited in nature and make no mention of residential venue. Thus, as with the other two special venue provisions cited by respondent, the restrictive reading given Title VII's provision has little relevance here.

7. Respondent asserts in its brief that the policies underlying the FAA are best served by reading the FAA's venue provisions to be exclusive of the general venue statute. *See* Resp. Br. at 6, 25. That is incorrect. The rigid and restrictive interpretation advanced by respondent is undermined, not bolstered, by policy considerations because it fails to ensure a sensible venue, conflicts with the policies of the FAA, and would in some cases lead to absurd results.

a. Petitioner demonstrated in the opening brief that arbitrations are not always conducted in districts that are convenient for litigating applications to confirm, vacate, or modify an arbitration award and that an exclusive interpretation of the FAA's venue provision would require such applications to be brought in inconvenient venues. *See* Pet. Br. at 18. As a case may only be transferred on grounds of inconvenience to another venue "where it might have been brought" initially, 28 U.S.C. § 1404(a), this means that respondent's restrictive interpretation of the FAA's special venue provisions would impose a rigid and inflexible rule upon applications to confirm, vacate, or modify arbitration awards, requiring them (in the absence of a forum selection agreement) to be litigated in the district in

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committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found in any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

42 U.S.C. § 2000e-5(f)(3).

which the award was made no matter how inconvenient that district may be. Although respondent does not deny that its interpretation would lead to its result, it does not attempt to explain why Congress would have intended this result or even why Congress would have wanted to prohibit applications to confirm, vacate, or modify arbitration awards from being brought in the district in which the sued party resides. *See supra* p. 4. As a consequence, respondent has failed to show that its restrictive interpretation yields a sensible venue rule.

b. The rigid interpretation advanced by respondent would also conflict with the policies underlying the FAA. In the first place, this interpretation would unnecessarily complicate the arbitration process. As previously pointed out, parties often have difficulty agreeing where to hold arbitrations. *See* Pet. Br. at 30. Making the location of the arbitration determine the venue of any subsequent judicial proceedings would only raise the stakes, making already contentious disputes even more intractable (*see id.*) — which is, no doubt, why the American Arbitration Association's rules require parties to an arbitration to "consent[] that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." American Arbitration Association, *Commercial Dispute Resolution Procedures* Rule 50(c) <http://www.adr.org/rules/commercial/commercial_rules.html> (visited Dec. 22, 1999).

The restrictive interpretation advanced by respondent would also impose a "pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the [FAA]" in many cases. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*, 460 U.S. 1, 27 (1983). As previously demonstrated, this interpretation would require applications to confirm to be brought in different districts from applications to vacate or modify where a forum-selection clause designates a venue besides the one in which the arbitration was conducted. *See* Pet. Br. at 31-32. Although such piecemeal litigation is

plainly contrary to the policies underlying the FAA, respondent does not dispute that the restrictive interpretation it advances would require separate applications under such circumstances.

Respondent denies that its interpretation would require piecemeal litigation where a suit is stayed in favor of arbitration and the arbitration is not conducted in the district in which that suit is pending. *See* Resp. Br. at 27-29. Respondent does not, however, deny that its interpretation, standing alone, leads to this result. *See* Pet. Br. at 30-31. Instead, respondent contends that this result is avoided due to the principle that a district court "retaining jurisdiction does not lose venue by virtue of later developments." Resp. Br. at 27. In other words, in order to avoid the absurd result that a party obtaining a stay in favor of arbitration cannot return to the court issuing the stay to confirm any resulting award, respondent carves out an exception to its restrictive interpretation. These interpretive gymnastics underscore the more sensible and internally consistent nature of a permissive interpretation of Sections 9, 10, and 11.

c. Respondent argues that the "determination by the arbitrator . . . as to the most convenient forum" should not be "relitigated in the district court." Resp. Br. at 26. Respondent does not, however, explain how the question of venue is litigated in arbitration. The procedure for determining the location of an arbitration is limited and informal: when there is an objection to the locale requested by the claimant, the parties submit written statements, and the conflict is resolved based upon the papers by a AAA officer. *See* I Thomas H. Oehmke, *Commercial Arbitration* § 26:13 (rev. ed. 1999). More fundamentally, the AAA does not determine where it is most convenient to litigate an application to confirm, vacate, or modify an arbitration award; it determines where it is most convenient to conduct an arbitration. Thus, the process by which the location of an arbitration is determined is hardly a

substitute for a judicial determination of the proper venue for proceedings in federal court.

Furthermore, there is no reason to think that the limited benefit that a rigid, inflexible venue rule would bring in deterring venue disputes would outweigh the many costs of a restrictive interpretation would impose in complicating the arbitration process in some cases, in requiring piecemeal litigation in others, and in forcing applications to confirm, vacate, or modify to be brought in inconvenient venues in still other cases. While all of these costs are unnecessary and wasteful, any motion practice concerning the proper venue would, by contrast, serve the positive purpose of ensuring that applications to confirm, vacate, or modify arbitration awards are not wastefully litigated in inconvenient venues. In addition, the courts are more than capable of fashioning presumptive rules, such as the first-filed doctrine, minimizing the cost of such motions practice. Thus, while arbitrators should determine the proper location for arbitrations, courts should determine the proper venue for any ensuing judicial proceedings.[4]

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[4] Although respondent acknowledges that the only issue before this Court is whether the courts below correctly found the FAA's venue provisions to be exclusive, *see* Resp. Br. at 4 n.2, 8, it urges this Court to "'take as true'" the district court's conclusory determination that petitioner had failed to state a cognizable challenge to the arbitration award in this case. *Id.* at 4 n.2. It is telling, however, that respondent does not even attempt to explain how the arbitration panel could, consistent with the terms of the contract in this case, have awarded an upward adjustment based upon a fictitious change order or why an award that arbitrarily disregards the terms of a contract cannot be vacated under the FAA. *See* Pet. Br. at 7 n.2 (noting that arbitration awards that do not draw their essence from the contract at issue are subject to *vacatur*).

CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the United States Court of Appeals for the Eleventh Circuit should be vacated, and the case remanded to the court of appeals.

Respectfully submitted,

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